

Message

---

**From:** Gettle, Jeaneanne [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8E72AA7E1894FAEA44006FD9F22B637-GETTLE, JEANEANNE]  
**Sent:** 9/29/2022 2:51:54 PM  
**To:** Hicks, Matt [Hicks.Matthew@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

All

I am surprised about the "in the dark" given we put it in correspondence to FL and we have also spoken to them about this matter. I believe we should consider pointing that out in our response. I really hate to let the statement stand unchallenged. Also, I have no recollection that FL wanted us to consult with NMFS and don't actually remember them ever encouraging us to consult on issues. My recollection is they questioned generally our need to consult and what that looked like.

jmg

---

**From:** Hicks, Matt <Hicks.Matthew@epa.gov>  
**Sent:** Thursday, September 29, 2022 10:24 AM  
**To:** Palmer, Leif <Palmer.Leif@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; McGill, Thomas <McGill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>  
**Cc:** Nagrani, Kavita <Nagrani.Kavita@epa.gov>  
**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Work Product (AWP)

Thanks,

Matt

---

**From:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>

**Sent:** Thursday, September 29, 2022 8:12 AM

**To:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>; Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

**Cc:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Work Product (AWP)

Simma Kupchan

Water Law Office

EPA Office of General Counsel

202-564-3105

---

**From:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Sent:** Wednesday, September 28, 2022 7:03 PM

**To:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

**Cc:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Attorney-Client Privileged/Work Product/FOIA Exempt

Hi Alexis, Kavita, Simma, and Matt,

## Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Thanks,  
Alison

---

**From:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>

**Sent:** Wednesday, September 28, 2022 3:11 PM

**To:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>; Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Cc:** Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)

**Subject:** [EXTERNAL] RE: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

Dear Counsel,

We are writing in response to recent correspondence concerning the Administrative Record ("AR") for the above-referenced case.

As stated previously, we believe that Federal Defendants should not include documents in the AR that post-date the agency action at issue in this case (i.e., the December 20, 2021 letter from EPA to Plaintiffs and the underlying Notice of Intent letter on the same topic). As a general rule, judicial review is limited to the AR in existence at the time of the agency's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The cases cited in the September 16<sup>th</sup> letter - including *Dallas Safari Club* and *San Francisco Baykeeper* - distinguish between circumstances where an agency action is being challenged under APA § 706(2) and actions to compel an agency action under APA § 706(1). Although the September 16<sup>th</sup> letter applies some of the same reasoning from the § 706(1) cases ("it may be that there has not yet been a clear endpoint of decision-making"), the cases relied upon do not support the inclusion of post-decisional material in this lawsuit, which does not assert APA § 706(1) claims. *Cf. Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Veterans Admin.*, 842 F. Supp. 2d 127, 130 (D.D.C. 2008) ("when it comes to agency inaction under 5 U.S.C. § 706(1), review is not limited to the record as it existed in any single point in time.").

We appreciate your continued consideration of this request. We are continuing to review the other proposed changes to the administrative record (as reflected in other recent correspondence between the parties) and reserve the right to raise additional AR-related concerns as appropriate.

Tania and Bonnie, we hope that you and yours are safe and secure during Hurricane Ian. All in Florida are in our thoughts and prayers this week as Ian passes through.

Sincerely,

Jeff

**Jeffrey H. Wood**

Partner

Baker Botts L.L.P.

[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)

T +1.202.639.7732

M +1.202.600.1630

700 K Street NW

Washington DC 20001

USA

---

**From:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Sent:** Friday, September 16, 2022 6:25 PM

**To:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>; Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; bmalloy@earthjustice.org

**Cc:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

Hi all,

The attached letter and table provide responses to the issues that you raised in your communications regarding the administrative records in this case.

As noted in the letter, we are available next week should you wish to discuss this further.

Thanks,

Andy

**Andrew Coghlan**

Trial Attorney

United States Department of Justice

Environmental Defense Section

(202) 514-9275

4 Constitution Square

150 M Street, NE

4.1122

Washington, DC 20002

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Message

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**From:** Gettle, Jeaneanne [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8E72AA7E1894FAEA44006FD9F22B637-GETTLE, JEANEANNE]  
**Sent:** 9/29/2022 5:03:51 PM  
**To:** Hicks, Matt [Hicks.Matthew@epa.gov]; McGill, Thomas [Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Looks good to me.

thanks

---

**From:** Hicks, Matt <Hicks.Matthew@epa.gov>  
**Sent:** Thursday, September 29, 2022 12:28 PM  
**To:** Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; McGill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>  
**Cc:** Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

# Ex. 5 Attorney Client (AC)

---

**From:** Wade, Alexis <Wade.Alexis@epa.gov>  
**Sent:** Thursday, September 29, 2022 11:30 AM  
**To:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>  
**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Hi Alison – I think that's fine with us.

Alexis Wade (she/her/hers)

Team Leader for Endangered Species Act, Ocean and Coastal Protection, and State Certification (EOCSC)

Water Law Office

EPA Office of General Counsel

(202) 564-3273

---

**From:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Sent:** Thursday, September 29, 2022 10:06 AM

**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

**Cc:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Attorney-Client Privileged/Work Product/FOIA Exempt

Simma,

## Ex. 5 Attorney Client (AC)

Please let me know if EPA is comfortable with this response.

Thanks,  
Alison

---

**From:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>

**Sent:** Thursday, September 29, 2022 8:12 AM

**To:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>; Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

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**Subject:** [EXTERNAL] RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Client (AC)

Simma Kupchan

Water Law Office

EPA Office of General Counsel

---

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Attorney-Client Privileged/Work Product/FOIA Exempt

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# Ex. 5 Attorney Client (AC)

Thanks,  
Alison

---

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**Cc:** Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)

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Tania and Bonnie, we hope that you and yours are safe and secure during Hurricane Ian. All in Florida are in our thoughts and prayers this week as Ian passes through.

Sincerely,  
Jeff  
**Jeffrey H. Wood**  
Partner

Baker Botts L.L.P.  
[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)  
T +1.202.639.7732  
M +1.202.600.1630

700 K Street NW  
Washington DC 20001  
USA

---

**From:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>  
**Sent:** Friday, September 16, 2022 6:25 PM  
**To:** Wood, Jeffrey <jeff.wood@BakerBotts.com>; Chinn, Lily <lily.chinn@bakerbotts.com>; Tania Galloni <tgalloni@earthjustice.org>; bmalloy@earthjustice.org  
**Cc:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>  
**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

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Thanks,

Andy

**Andrew Coghlan**  
Trial Attorney  
United States Department of Justice  
Environmental Defense Section  
(202) 514-9275  
4 Constitution Square  
150 M Street, NE  
4.1122  
Washington, DC 20002

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Message

**From:** Gettle, Jeaneanne [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D8E72AA7E1894FAEA44006FD9F22B637-GETTLE, JEANEANNE]  
**Sent:** 5/19/2022 9:27:31 PM  
**To:** Thompson, Fred [Thompson.Fred@epa.gov]  
**Subject:** FW: New letter from Earthjustice re: Florida 404 program  
**Attachments:** 2022 05 19 Confidential Settlement Correspondence.pdf; Princeton Oaks\_Notice of Violation Correspondence.pdf; Spruce Creek\_New Interstate 95 interchange hurts creek but benefits Florida governor's buddy.pdf

FYI

---

**From:** Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Sent:** Thursday, May 19, 2022 3:25 PM  
**To:** Goodin, John <Goodin.John@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; McGill, Thomas <McGill.Thomas@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Pollins, Mark <Pollins.Mark@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Quast, Sylvia <Quast.Sylvia@epa.gov>; Bermudez, Navis <Bermudez.Navis@epa.gov>; Aubee, Catherine <Aubee.Catherine@epa.gov>  
**Cc:** Speir, Jeffrey <speir.jeffrey@epa.gov>; Fergusson, Bruce <Fergusson.Bruce@epa.gov>; Lamberth, Larry <Lamberth.Larry@epa.gov>; Chaudhary, Dimple <Chaudhary.Dimple@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Kaiser, Russell <Kaiser.Russell@epa.gov>; Ghosh, Mita <Ghosh.Mita@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>; Diaz, Denisse <Diaz.Denisse@epa.gov>; Cisar, Elizabeth <Cisar.Elizabeth@epa.gov>; Kemker, Carol <Kemker.Carol@epa.gov>; Sable, Kacy <Sable.Kacy@epa.gov>; Theis, Joseph <Theis.Joseph@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Wawro, Libby <Wawro.Libby@epa.gov>; Monell, Carol <Monell.Carol@epa.gov>; Nicholson, John <Nicholson.John@epa.gov>; Morgan, James <Morgan.James@epa.gov>  
**Subject:** New letter from Earthjustice re: Florida 404 program

All,

Attached is correspondence received today from Earthjustice. I don't think

**Ex. 5 Deliberative Process (DP)**

## **Ex. 5 Deliberative Process (DP)**

Here is an excerpt from the first few paragraphs, FYI:

In the interest of trying to resolve this matter, we would like to bring additional information to your clients' attention....We welcome the opportunity to discuss these issues with an eye toward reaching an agreement

that restores 404 authority to the U.S. Army Corps of Engineers either pending judicial review and/or until Florida can establish a program that complies with federal law.

### ***High-Level Departures***

As a preliminary matter, you are likely already aware that there has been continuous turnover among staff assigned to the state 404 program, which remains unable to retain qualified, well trained employees. We wanted to be sure you were also aware of recent high-level departures.

Heather Mason, a longtime employee of the Florida Department of Environmental Protection ("FDEP") and Administrator of the state 404 Program, recently resigned. We understand that

she cited the program's mismanagement and related moral concerns as reasons for leaving. She is now with the U.S. Army Corps of Engineers.

Eric Hickman, longtime Administrator of Wetland Evaluation and Delineation, also recently resigned, citing concerns about the consistent and continuous mismanagement of Florida's 404 program. Mr. Hickman has been recognized as the foremost wetlands expert in the state, including on federal issues, and his departure leaves no one else with anywhere near that level of expertise in the agency.

Florida's mismanagement began with its disingenuous claim that FDEP could simply fold Section 404 into its existing state law operations. As discussed further below, FDEP's administration of the program has demonstrated little regard for applicable federal law.

### ***Florida's Continued Application of NWPR***

As we understand it, FDEP continues to apply the unlawful, vacated Navigable Waters Protection Rule ("NWPR"), notwithstanding EPA's admonitions not to. While EPA has objected to some permits on this basis, the state's reliance on NWPR is still causing harm.

### ***"No Permit Required" Determinations Under NWPR***

FDEP continues to render "no permit required" determinations ("NPRs") based on NWPR, and indeed uses a form to determine whether a project requires a 404 permit based on whether the affected waters meet the NWPR definition. As a result, the state has and will continue to advise certain applicants that *no* permit is required to dredge and fill certain waters of the United States ("WOTUS") because they do not fall under the NWPR definition of WOTUS.

When FDEP makes a NPR determination that turns on application of the NWPR, not only is an applicant granted a free pass to dredge and fill WOTUS, but the project also receives no review for its impact on federally-listed threatened and endangered species. A search in Oculus shows that FDEP has issued nearly 250 NPRs since December 9, 2021, when EPA confirmed in writing to FDEP that NWPR was no longer applicable law. As long as FDEP applies NWPR, we cannot have any confidence in the lawfulness of its NPR determinations.

Simma Kupchan  
Water Law Office  
EPA Office of General Counsel  
202-564-3105

-----Original Appointment-----

**From:** Goodin, John <[Goodin.John@epa.gov](mailto:Goodin.John@epa.gov)>

**Sent:** Thursday, November 18, 2021 2:24 PM

**To:** Goodin, John; Gettle, Jeaneanne; Neugeboren, Steven; Wehling, Carrie; McGill, Thomas; Eisenberg, Mindy; Pollins, Mark; Palmer, Leif; Quast, Sylvia; Bermudez, Navis; Aubee, Catherine

**Cc:** Speir, Jeffrey; Fergusson, Bruce; Lamberth, Larry; Chaudhary, Dimple; Frazer, Brian; Kaiser, Russell; Kupchan, Simma; Ghosh, Mita; Hurlb, Kathy; Hicks, Matt; Calli, Rosemary; Laycock, Kelly; Diaz, Denisse; Cisar, Elizabeth; Kemker, Carol; Sable, Kacy; Theis, Joseph; Wade, Alexis; Nagrani, Kavita; Creswell, Michael; Wawro, Libby; Monell, Carol; Nicholson, John; Morgan, James

**Subject:** FL's Assumed CWA 404 Program - Recurring Discussion

**When:** Thursday, May 26, 2022 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** Microsoft Teams Meeting

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Microsoft Teams meeting

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**Ex. 6 Personal Privacy (PP)** United States, Washington DC

Phone Conference ID **Ex. 6 Personal Privacy (PP)**

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Message

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**From:** Hicks, Matt [Hicks.Matthew@epa.gov]  
**Sent:** 9/29/2022 4:27:42 PM  
**To:** Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

# Ex. 5 Attorney Client (AC)

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**Sent:** Thursday, September 29, 2022 11:30 AM  
**To:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>  
**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Hi Alison – I think that's fine with us.

Alexis Wade (she/her/hers)  
Team Leader for Endangered Species Act, Ocean and Coastal Protection, and State Certification (EOCSC)  
Water Law Office  
EPA Office of General Counsel  
(202) 564-3273

---

**From:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>  
**Sent:** Thursday, September 29, 2022 10:06 AM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita

<Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>

Cc: Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>

**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Attorney-Client Privileged/Work Product/FOIA Exempt

Simma,

## Ex. 5 Attorney Client (AC)

Thanks,  
Alison

---

**From:** Kupchan, Simma <Kupchan.Simma@epa.gov>

**Sent:** Thursday, September 29, 2022 8:12 AM

**To:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>

**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>

**Subject:** [EXTERNAL] RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Client (AC)

Simma Kupchan  
Water Law Office  
EPA Office of General Counsel  
202-564-3105

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**From:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>

**Sent:** Wednesday, September 28, 2022 7:03 PM

**To:** Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>

**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>

**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Attorney-Client Privileged/Work Product/FOIA Exempt

Hi Alexis, Kavita, Simma, and Matt,

# **Ex. 5 Attorney Client (AC)**

Thanks,  
Alison

---

**From:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>

**Sent:** Wednesday, September 28, 2022 3:11 PM

**To:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>; Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Cc:** Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)

**Subject:** [EXTERNAL] RE: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

Dear Counsel,

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Tania and Bonnie, we hope that you and yours are safe and secure during Hurricane Ian. All in Florida are in our thoughts and prayers this week as Ian passes through.

Sincerely,

Jeff

**Jeffrey H. Wood**

Partner

Baker Botts L.L.P.

[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)

T +1.202.639.7732

M +1.202.600.1630

700 K Street NW

Washington DC 20001

USA

---

**From:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Sent:** Friday, September 16, 2022 6:25 PM

**To:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>; Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)

**Cc:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

Hi all,

The attached letter and table provide responses to the issues that you raised in your communications regarding the administrative records in this case.

As noted in the letter, we are available next week should you wish to discuss this further.

Thanks,

Andy

**Andrew Coghlan**

Trial Attorney

United States Department of Justice

Environmental Defense Section

(202) 514-9275

4 Constitution Square

150 M Street, NE

4.1122

Washington, DC 20002

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Message

---

**From:** Hicks, Matt [Hicks.Matthew@epa.gov]  
**Sent:** 9/29/2022 2:24:02 PM  
**To:** Palmer, Leif [Palmer.Leif@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Work Product (AWP)

Thanks,

Matt

---

**From:** Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Sent:** Thursday, September 29, 2022 8:12 AM  
**To:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>  
**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

## Ex. 5 Attorney Client (AC)

Simma Kupchan  
Water Law Office  
EPA Office of General Counsel  
202-564-3105

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**From:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>  
**Sent:** Wednesday, September 28, 2022 7:03 PM

**To:** Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>

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Attorney-Client Privileged/Work Product/FOIA Exempt

Hi Alexis, Kavita, Simma, and Matt,

# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Thanks,  
Alison

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**Cc:** Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalley@earthjustice.org](mailto:bmalley@earthjustice.org)

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Sincerely,  
Jeff  
**Jeffrey H. Wood**  
Partner

Baker Botts LLP.  
[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)  
T +1.202.639.7732  
M +1.202.600.1630

700 K Street NW  
Washington DC 20001  
USA

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**To:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>; Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)  
**Cc:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>  
**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

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Thanks,

Andy

**Andrew Coghlan**  
Trial Attorney  
United States Department of Justice  
Environmental Defense Section  
(202) 514-9275  
4 Constitution Square  
150 M Street, NE  
4.1122  
Washington, DC 20002

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Message

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**From:** Hicks, Matt [Hicks.Matthew@epa.gov]  
**Sent:** 9/29/2022 3:26:20 PM  
**To:** Palmer, Leif [Palmer.Leif@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

See DOJ's addition to the proposed response to Florida.

---

**From:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>  
**Sent:** Thursday, September 29, 2022 10:06 AM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>  
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Attorney-Client Privileged/Work Product/FOIA Exempt

Simma,

## Ex. 5 Attorney Client (AC)

Please let me know if EPA is comfortable with this response.

Thanks,  
Alison

---

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**Sent:** Thursday, September 29, 2022 8:12 AM  
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## Ex. 5 Attorney Client (AC)

Simma Kupchan

Water Law Office  
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202-564-3105

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# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Thanks,  
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Sincerely,  
Jeff  
**Jeffrey H. Wood**  
Partner

Baker Botts LLP.  
[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)

T +1.202.639.7732  
M +1.202.600.1630

700 K Street NW  
Washington DC 20001  
USA

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**Cc:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>  
**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

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Thanks,

Andy

**Andrew Coghlan**  
Trial Attorney  
United States Department of Justice  
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4 Constitution Square  
150 M Street, NE  
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Washington, DC 20002

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Message

---

**From:** Hicks, Matt [Hicks.Matthew@epa.gov]  
**Sent:** 10/3/2022 5:45:13 PM  
**To:** Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; McGill, Thomas [Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]  
**CC:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Jeaneanne,

I sent the email below to DOJ and was informed of a couple of things that I wanted to run by you:

# Ex. 5 Attorney Client (AC)

Thanks,

Matt

---

**From:** Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>  
**Sent:** Thursday, September 29, 2022 1:04 PM  
**To:** Hicks, Matt <Hicks.Matthew@epa.gov>; McGill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>  
**Cc:** Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Looks good to me.

thanks

---

**From:** Hicks, Matt <Hicks.Matthew@epa.gov>  
**Sent:** Thursday, September 29, 2022 12:28 PM  
**To:** Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; McGill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>  
**Cc:** Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Creswell, Michael <Creswell.Michael@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>; Laycock, Kelly <Laycock.Kelly@epa.gov>  
**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

# Ex. 5 Attorney Client (AC)

---

**From:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>  
**Sent:** Thursday, September 29, 2022 11:30 AM  
**To:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>; Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>  
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**Subject:** RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Hi Alison – I think that's fine with us.

Alexis Wade (she/her/hers)  
Team Leader for Endangered Species Act, Ocean and Coastal Protection, and State Certification (EOCSC)  
Water Law Office  
EPA Office of General Counsel  
(202) 564-3273

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Simma,

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Thanks,  
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**To:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>; Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

**Cc:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Subject:** [EXTERNAL] RE: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

# Ex. 5 Attorney Client (AC)

Simma Kupchan  
Water Law Office  
EPA Office of General Counsel  
202-564-3105

---

**From:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Sent:** Wednesday, September 28, 2022 7:03 PM

**To:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Nagrani, Kavita <[Nagrani.Kavita@epa.gov](mailto:Nagrani.Kavita@epa.gov)>; Hicks, Matt <[Hicks.Matthew@epa.gov](mailto:Hicks.Matthew@epa.gov)>

**Cc:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>

**Subject:** FW: Florida 404 - forwarding email from Florida, update on call w/Florida counsel - privileged/work product/FOIA exempt

Attorney-Client Privileged/Work Product/FOIA Exempt

Hi Alexis, Kavita, Simma, and Matt,

# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Thanks,  
Alison

---

**From:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>

**Sent:** Wednesday, September 28, 2022 3:11 PM

**To:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>; Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>

**Cc:** Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)

**Subject:** [EXTERNAL] RE: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

Dear Counsel,

We are writing in response to recent correspondence concerning the Administrative Record ("AR") for the above-referenced case.

As stated previously, we believe that Federal Defendants should not include documents in the AR that post-date the agency action at issue in this case (i.e., the December 20, 2021 letter from EPA to Plaintiffs and the underlying Notice of Intent letter on the same topic). As a general rule, judicial review is limited to the AR in existence at the time of the agency's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The cases cited in the September 16<sup>th</sup> letter - including *Dallas Safari Club* and *San Francisco Baykeeper* - distinguish between circumstances where an agency action is being challenged under APA § 706(2) and actions to compel an agency action under APA § 706(1). Although the September 16<sup>th</sup> letter applies some of the same reasoning from the § 706(1) cases ("it may be that there has not yet been a clear endpoint of decision-making"), the cases relied upon do not support the inclusion of post-decisional material in this lawsuit, which does not assert APA § 706(1) claims. *Cf. Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Veterans Admin.*, 842 F. Supp. 2d 127, 130 (D.D.C. 2008) ("when it comes to agency inaction under 5 U.S.C. § 706(1), review is not limited to the record as it existed in any single point in time.").

We appreciate your continued consideration of this request. We are continuing to review the other proposed changes to the administrative record (as reflected in other recent correspondence between the parties) and reserve the right to raise additional AR-related concerns as appropriate.

Tania and Bonnie, we hope that you and yours are safe and secure during Hurricane Ian. All in Florida are in our thoughts and prayers this week as Ian passes through.

Sincerely,  
Jeff  
**Jeffrey H. Wood**  
Partner

Baker Botts L.L.P.  
[jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com)  
T +1.202.639.7732  
M +1.202.600.1630

700 K Street NW  
Washington DC 20001  
USA

---

**From:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>  
**Sent:** Friday, September 16, 2022 6:25 PM  
**To:** Wood, Jeffrey <[jeff.wood@BakerBotts.com](mailto:jeff.wood@BakerBotts.com)>; Chinn, Lily <[lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com)>; Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>; [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)  
**Cc:** Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>  
**Subject:** Re: CBD, et al. v. EPA, et al., 21-cv-119-RDM – Administrative Records

[EXTERNAL EMAIL]

Hi all,

The attached letter and table provide responses to the issues that you raised in your communications regarding the administrative records in this case.

As noted in the letter, we are available next week should you wish to discuss this further.

Thanks,

Andy

**Andrew Coghlan**

Trial Attorney

United States Department of Justice

Environmental Defense Section

(202) 514-9275

4 Constitution Square

150 M Street, NE

4.1122

Washington, DC 20002

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**From:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**Sent:** 9/2/2022 2:49:15 PM  
**To:** Laycock, Kelly [Laycock.Kelly@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Hansen, Susan [Hansen.Susan@epa.gov]  
**CC:** Hicks, Matt [Hicks.Matthew@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]  
**Subject:** FW: Florida 404 - correspondence from Plaintiffs re: deficiencies in AR - privileged/work product/FOIA exempt  
**Attachments:** 2022 09 01 CBD v EPA 21-cv-119 Plaintiffs Letter re AR\_FINAL.pdf; f.Florida 404 Assumption - EPA AR - Plaintiffs Records to Add.pdf; Florida 404 Assumption - USFWS AR - Plaintiffs Records to Add.pdf

**Importance:** High

ATTORNEY CLIENT PRIVILEGED. DELIBERATIVE.

Hey everyone,

# Ex. 5 Attorney Client (AC)

Kavita

---

**From:** Finnegan, Alison C. (ENRD) <Alison.C.Finnegan@usdoj.gov>  
**Sent:** Thursday, September 1, 2022 7:05 PM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>  
**Cc:** Coghlan, Andrew (ENRD) <Andrew.Coghlan@usdoj.gov>  
**Subject:** FW: Florida 404 - correspondence from Plaintiffs re: deficiencies in AR - privileged/work product/FOIA exempt  
**Importance:** High

Attorney-Client Privileged/Work Product/FOIA Exempt

Hi Simma, Matt, Alexis, and Kavita,

# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Thanks,  
Alison

---

**From:** Tania Galloni <[tgalloni@earthjustice.org](mailto:tgalloni@earthjustice.org)>  
**Sent:** Thursday, September 1, 2022 6:45 PM  
**To:** Coghlan, Andrew (ENRD) <[Andrew.Coghlan@usdoj.gov](mailto:Andrew.Coghlan@usdoj.gov)>; Finnegan, Alison C. (ENRD) <[Alison.C.Finnegan@usdoj.gov](mailto:Alison.C.Finnegan@usdoj.gov)>  
**Cc:** [jeff.wood@bakerbotts.com](mailto:jeff.wood@bakerbotts.com); [lily.chinn@bakerbotts.com](mailto:lily.chinn@bakerbotts.com); [bmalloy@earthjustice.org](mailto:bmalloy@earthjustice.org)  
**Subject:** [EXTERNAL] CBD v. EPA, 21-cv-119 (D.D.C.) - Administrative Record

Dear All:

Please see the attached correspondence and spreadsheets re: Plaintiffs' issues with the administrative record for EPA and USFWS. The documents are available through box at this link:  
<https://app.box.com/s/28syutyf37veccgji887zjb0wld6tmpi>. We look forward to hearing from you after you've had a chance to review.

All the best,

Tania

\*\*\*

Tania Galloni  
Managing Attorney  
Florida Regional Office  
4500 Biscayne Blvd., Ste 201  
Miami, FL 33137  
(305) 440-5434  
[www.earthjustice.org](http://www.earthjustice.org)



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Message

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**From:** Nagrani, Kavita [Nagrani.Kavita@epa.gov]  
**Sent:** 6/17/2022 2:16:59 PM  
**To:** Snyder, Katherine [Snyder.Katherine@epa.gov]; Hudda, Laila [Hudda.Laila@epa.gov]; Hansel, Joel [Hansel.Joel@epa.gov]; Bouma, Stacey [Bouma.Stacey@epa.gov]  
**CC:** Palmer, Leif [Palmer.Leif@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Allenbach, Becky [Allenbach.Becky@epa.gov]  
**Subject:** FW: Save the Manatee v. EPA (M.D. Fla)\_Draft Answer  
**Attachments:** 6.17\_Draft Answer\_EPA\_to DOJ.docx; complaint.pdf

ATTORNEY CLIENT PRIVILEGED. DELIBERATIVE.

Good morning,

As you may know, DOJ requested that EPA put together a first draft of our response to Earthjustice's complaint about the IRL/NNC/manatees, so Eleanor (OGC), Alexis (OGC), and I divided up the complaint and have been working on preparing this draft. We just finished yesterday afternoon, and Eleanor forwarded the draft to DOJ for its review this morning and included our notes in the margins. The answer must be filed with the court no later than **July 8**, so Brett and Rob (both at DOJ) will now work on getting this in final format over the next couple of weeks. However, I wanted to send this your way for your awareness and also to provide anyone who is interested with the opportunity to read over our proposed answer, but only if you are so inclined (please don't feel obligated to do so). You will see that we have responded to each sentence in the complaint, which also is attached for reference. Eleanor also mentioned she will share the draft with some in HQ. As this is still a working document, we are able to make edits until we must file, which is in three weeks.

**Ex. 5 Attorney Client (AC)**

## Ex. 5 Attorney Client (AC)

---

**From:** Garretson, Eleanor <Garretson.Eleanor@epa.gov>  
**Sent:** Friday, June 17, 2022 9:36 AM  
**To:** Grosko, Brett (ENRD) <Brett.Grosko@usdoj.gov>; Norway, Robert M. (ENRD) <Robert.M.Norway@usdoj.gov>  
**Cc:** Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>  
**Subject:** Save the Manatee v. EPA (M.D. Fla)\_Draft Answer

Hi Brett and Rob,

Attached is our draft answer to the Complaint in Save the Manatee v. EPA. We've included some comments where we had questions on particular responses or wanted to flag something for DOJ's attention.

Please let us know if you have any questions.

Best,  
Eleanor

Eleanor Garretson  
Attorney-Advisor  
U.S. Environmental Protection Agency  
Office of General Counsel, WLO/CCILO  
Cell: (202) 495-8997  
Office: (202) 564-9636



Message

---

**From:** Kupchan, Simma [Kupchan.Simma@epa.gov]  
**Sent:** 5/19/2022 7:25:27 PM  
**To:** Goodin, John [Goodin.John@epa.gov]; Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]; McGill, Thomas [McGill.Thomas@epa.gov]; Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Pollins, Mark [Pollins.Mark@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]; Quast, Sylvia [Quast.Sylvia@epa.gov]; Bermudez, Navis [Bermudez.Navis@epa.gov]; Aubee, Catherine [Aubee.Catherine@epa.gov]  
**CC:** Speir, Jeffrey [speir.jeffrey@epa.gov]; Fergusson, Bruce [Fergusson.Bruce@epa.gov]; Lamberth, Larry [Lamberth.Larry@epa.gov]; Chaudhary, Dimple [Chaudhary.Dimple@epa.gov]; Frazer, Brian [Frazer.Brian@epa.gov]; Kaiser, Russell [Kaiser.Russell@epa.gov]; Ghosh, Mita [Ghosh.Mita@epa.gov]; Hurl, Kathy [Hurl.Kathy@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Diaz, Denisse [Diaz.Denisse@epa.gov]; Cisar, Elizabeth [Cisar.Elizabeth@epa.gov]; Kemker, Carol [Kemker.Carol@epa.gov]; Sable, Kacy [Sable.Kacy@epa.gov]; Theis, Joseph [Theis.Joseph@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Creswell, Michael [Creswell.Michael@epa.gov]; Wawro, Libby [Wawro.Libby@epa.gov]; Monell, Carol [Monell.Carol@epa.gov]; Nicholson, John [Nicholson.John@epa.gov]; Morgan, James [Morgan.James@epa.gov]  
**Subject:** New letter from Earthjustice re: Florida 404 program  
**Attachments:** 2022 05 19 Confidential Settlement Correspondence.pdf; Princeton Oaks\_Notice of Violation Correspondence.pdf; Spruce Creek\_New Interstate 95 interchange hurts creek but benefits Florida governor's buddy.pdf

All,

Attached is correspondence received today from Earthjustice. I don't think this should change our plan for outreach in the next few days, and we can consider whether any of this information warrants revision of the key points R4/Jeananne were planning to make in discussions with FDEP in the next few weeks.

Here is an excerpt from the first few paragraphs, FYI:

In the interest of trying to resolve this matter, we would like to bring additional information to your clients' attention....We welcome the opportunity to discuss these issues with an eye toward reaching an agreement that restores 404 authority to the U.S. Army Corps of Engineers either pending judicial review and/or until Florida can establish a program that complies with federal law.

### ***High-Level Departures***

As a preliminary matter, you are likely already aware that there has been continuous turnover among staff assigned to the state 404 program, which remains unable to retain qualified, well trained employees. We wanted to be sure you were also aware of recent high-level departures.

Heather Mason, a longtime employee of the Florida Department of Environmental Protection ("FDEP") and Administrator of the state 404 Program, recently resigned. We understand that she cited the program's mismanagement and related moral concerns as reasons for leaving. She is now with the U.S. Army Corps of Engineers.

Eric Hickman, longtime Administrator of Wetland Evaluation and Delineation, also recently resigned, citing concerns about the consistent and continuous mismanagement of Florida's 404 program. Mr. Hickman has been recognized as the foremost wetlands expert in the state, including on federal issues, and his departure leaves no one else with anywhere near that level of expertise in the agency.

Florida's mismanagement began with its disingenuous claim that FDEP could simply fold

Section 404 into its existing state law operations. As discussed further below, FDEP's administration of the program has demonstrated little regard for applicable federal law.

### ***Florida's Continued Application of NWPR***

As we understand it, FDEP continues to apply the unlawful, vacated Navigable Waters Protection Rule ("NWPR"), notwithstanding EPA's admonitions not to. While EPA has objected to some permits on this basis, the state's reliance on NWPR is still causing harm.

### ***"No Permit Required" Determinations Under NWPR***

FDEP continues to render "no permit required" determinations ("NPRs") based on NWPR, and indeed uses a form to determine whether a project requires a 404 permit based on whether the affected waters meet the NWPR definition. As a result, the state has and will continue to advise certain applicants that *no* permit is required to dredge and fill certain waters of the United States ("WOTUS") because they do not fall under the NWPR definition of WOTUS.

When FDEP makes a NPR determination that turns on application of the NWPR, not only is an applicant granted a free pass to dredge and fill WOTUS, but the project also receives no review for its impact on federally-listed threatened and endangered species. A search in Oculus shows that FDEP has issued nearly 250 NPRs since December 9, 2021, when EPA confirmed in writing to FDEP that NWPR was no longer applicable law. As long as FDEP applies NWPR, we cannot have any confidence in the lawfulness of its NPR determinations.

Simma Kupchan  
Water Law Office  
EPA Office of General Counsel  
202-564-3105

-----Original Appointment-----

**From:** Goodin, John <Goodin.John@epa.gov>

**Sent:** Thursday, November 18, 2021 2:24 PM

**To:** Goodin, John; Gettle, Jeaneanne; Neugeboren, Steven; Wehling, Carrie; McGill, Thomas; Eisenberg, Mindy; Pollins, Mark; Palmer, Leif; Quast, Sylvia; Bermudez, Navis; Aubee, Catherine

**Cc:** Speir, Jeffrey; Fergusson, Bruce; Lamberth, Larry; Chaudhary, Dimple; Frazer, Brian; Kaiser, Russell; Kupchan, Simma; Ghosh, Mita; Hurlid, Kathy; Hicks, Matt; Calli, Rosemary; Laycock, Kelly; Diaz, Denisse; Cisar, Elizabeth; Kemker, Carol; Sable, Kacy; Theis, Joseph; Wade, Alexis; Nagrani, Kavita; Creswell, Michael; Wawro, Libby; Monell, Carol; Nicholson, John; Morgan, James

**Subject:** FL's Assumed CWA 404 Program - Recurring Discussion

**When:** Thursday, May 26, 2022 1:00 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** Microsoft Teams Meeting

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**From:** Holtzclaw, Brian [Holtzclaw.Brian@epa.gov]  
**Sent:** 7/28/2022 4:03:42 PM  
**To:**

# Ex. 6 Personal Privacy (PP)

# **Ex. 6 Personal Privacy (PP)**

CC:

# Ex. 6 Personal Privacy (PP)

**Subject:** Time Sensitive & Heads Up: U.S. EPA Region 4 Information Sessions (July 28, Aug 1) on Environmental Justice (EJ) Developments & Upcoming Fundings  
**Location:** Microsoft Teams Meeting

**Start:** 7/28/2022 6:00:00 PM

**End:** 7/28/2022 7:00:00 PM

**Show Time As:** Tentative

**Required Attendees:** (unknown property type)

**Optional Attendees:** Jeff Ownby; **Ex. 6 Personal Privacy (PP)** Bryant, Kyle; Good, Sheryl; David Metcalf; Jan McGoldrick; Jan McGoldrick; noah@urbangreenlab.org; Chuck Barlow; Dede Rukmana; Denise Tennessee; Gewel Richardson; Jay Bassett; Joyce Ann Pressley; Michael Bailey; Michael Burns; Moses Ayuk; Patrice Ruffin; Shakeena Reeves; Tamani Simmons; Traycee Chapman; V L Bitting; William Baker; Williamson, Dana; Miller, Latoya; denise@policyinnovation.org; R. Williams; sion@policyinnovation.org; Barbara Dilligard; SARAHWILLIAMS3802; Elease Amos-Goodwin; Welch, Angus; Hano, Mary Clare; DiMaio, Jennifer; Van Der Wiele, Cynthia; Morris, Janine; Inhorn, Emma; Benjamin, Erskine; Shell, Karrie-Jo; Wahlstrom-Ramler, Meghan; Stebbins, Margaret; Orr, Chauncey; Petter, Lauren; Stokes, Sylvester; Ragland, Rainey; Cole, Sibyl; Jones, Erica; Arzon, Arturo; Polinsky, Robyn; Diaz, Denisse; Bouma, Stacey; Sturdivant, Donnette; Lapapa, Brianna; Cynthia Peurifoy; Regina Smardon; Smith, Dominique

Good morning,

This call will provide an opportunity for attendees to learn about new EJ program developments, technical assistance and funding opportunities. Scroll down to see the connection information. Feel free to share it with communities and other entities. Another call is scheduled for Monday.

All the best,

Bonita

\*\*\*\* NOTE --- Please see TEAMS or phone # connection info, far below \*\*\*\*

Community Organizations, Non-Profits, Colleges/Universities, Indian Tribes, States, Local Government:

Greetings! Kindly review and pass on to others that may benefit. (Sorry for any cross-postings).

**Our Environmental Justice (EJ) program would like to bring to your attention two (2) informational meetings**, to which you will receive an invitation (please consider attending a session; see date/times below). *We will be sharing some very new and exciting U.S. EPA EJ developments, resource and funding opportunities that will benefit especially vulnerable communities that are low-income, or people of color, or indigenous.*

Information Session #1: Thursday, July 28, 2-3pm (EST)

or

Information Session #2: Monday, August 1, 10-11am (EST)

**Our draft agenda includes:**

- a. **Update on EPA Region 4 EJ developments** (i.e., program, EJ Academy, hiring and more).
- b. **Upcoming EJ-related fundings in the coming months.** *We plan to cover not only our traditional EJ grants, but also two new RFA – “Request for Application” Fundings that are anticipated to be announced early August and September (see more information below).* We wanted to extend this information to you personally so that you can consider, or help us identify potential applicants to support our Southeast communities and advance EJ & civil rights. We will answer your questions accordingly and hope you'll spread the good news with your partners.

**Supplemental Information**

- **“New” Funding: “TECHNICAL ASSISTANCE RFA to be Announced.”** Highlights, as of this time:
  - **TC-TAC – Thriving Communities Technical Assistance Centers program** (previously called REACH – Regional Equity & Capacity Hubs)
    - Concept: A “one-stop shop” Technical Assistance (TA) program with a special emphasis on underserved communities where multiple centers across the USA provide support on a wide range of topics (i.e., Technical Assistance, Training, and Support/Resource Activities).
    - Funding: It is projected that a total of \$50 million in funding will be awarded under this RFA. EPA anticipates making between 5 - 10 incrementally funded awards with periods of performance of three years with total funding of approximately \$6 million per award depending on an array of factors (\$2M budgeted per year).
    - Eligible: *public/private universities, public/private nonprofit orgs/institutions, Intertribal Consortia.* More specifics to come in the RFA.
    - RFA – Request for Applications, anticipated early August 2022.
    - Outreach: EPA HQs will be doing outreach webinars to help explain this opportunity
- **“New” Funding: “FUND-THE-FUNDER” RFA to be Announced.”** Highlights, as of this time:
  - **Pilot Sub-Award Approach for Small Grants: “FUND-THE-FUNDER”**
    - Concept: The Agency is Piloting a “Fund-the-Funder” approach and will provide all funds for EJ Small Grants to 1 - 2 entities to manage the program. The organization will manage the competition process and subaward funds to communities.
    - Eligible: Nonprofits (large), Colleges/universities, & Intertribal Consortia
    - Awardee(s): *1-2 entities, will received estimated \$10M*
    - RFA – Request for Applications, anticipated September 2022.
    - Outreach: EPA HQs will be doing outreach webinars to help explain this opportunity

In closing, it's estimated that for our Southeast Region 4, we have an average of 38% of our U.S. Census tracts being disadvantaged (per the CEST – beta version on-line tool; ranging from 34% to 58% within our 8 states\*) – so we thank you for your service to many of these under-served and vulnerable Southeast communities with EJ concerns.

**We appreciate your consideration to attend a session and get our latest EJ news. We hope to see you @ any session.** If you have a conflict, please feel free to contact our Regional EJ Coordinator, Tami Thomas-Burton (404-562-8027, [thomas-burton.tami@epa.gov](mailto:thomas-burton.tami@epa.gov)) or myself at any time. We'd be happy to share the materials we will have covered for those sessions, or speak with you. Greatly appreciated,

Brian L. Holtzclaw | Section Chief | Environmental Justice and Children's Health Section (EJCHS)  
Strategic Programs Office | Office of the Regional Administrator | US EPA Region 4  
61 Forsyth Street SW, Atlanta GA 30303  
Office: 404-562-8684 | Cell: 404-821-0697 | [holtzclaw.brian@epa.gov](mailto:holtzclaw.brian@epa.gov)



**Environmental Justice Hotline:** To report incidents of environmental injustice. Phone: 800-962-

6215 - Toll Free;

E-mail: [ej hotline@epa.gov](mailto:ej hotline@epa.gov); Hours: 9:00 a.m. - 5:00 p.m. ET

**Reporting Spills and Environmental Violations Hotline:** Emergency events and spills or releases should be reported through the National Response Center. Also, one can report possible violations of environmental laws and regulations. Phone: 1-800-424-8802; Webpage: <https://echo.epa.gov/report-environmental-violations>; Hours: 24 hours a day

**For up-to-date information:** Subscribe to EPA's Environmental Justice listserv by sending a blank email to: [join-epa-ej@lists.epa.gov](mailto:join-epa-ej@lists.epa.gov). Follow us on Twitter: [@EPAEnvJustice](https://twitter.com/EPAEnvJustice).

\*= MS, AL, GA, FL, SC, NC, TN, KY

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**From:** Holtzclaw, Brian [Holtzclaw.Brian@epa.gov]  
**Sent:** 7/29/2022 9:45:37 PM  
**To:**

# **Ex. 6 Personal Privacy (PP)**

# **Ex. 6 Personal Privacy (PP)**

CC:

# Ex. 6 Personal Privacy (PP)

**Subject:** Environmental Justice (EJ) Developments & Upcoming \$\$ Fundings: U.S. EPA Region 4 Information Sessions (July 28, Aug 1)  
**Location:** Microsoft Teams Meeting  
**Start:** 8/1/2022 2:00:00 PM  
**End:** 8/1/2022 3:00:00 PM  
**Show Time As:** Tentative

**Required** (unknown property type)

**Attendees:**

**Optional**

**Attendees:**

# Ex. 6 Personal Privacy (PP)

\*\*\*\* NOTE --- Please see TEAMS or phone # connection info, far below \*\*\*\*

Community Organizations, Non-Profits, Colleges/Universities, Indian Tribes, States, Local Government and other Stakeholders:

Greetings! Kindly review and pass on to others that may benefit. (Sorry for any cross-postings).

**Our Environmental Justice (EJ) program would like to bring to your attention two (2) informational meetings**, to which you will receive an invitation (please consider attending a session; see date/times below). *We will be sharing some very new and exciting U.S. EPA EJ developments, resource and funding opportunities that will benefit especially vulnerable communities that are low-income, or people of color, or indigenous.*

Information Session #1: Thursday, July 28, 2-3pm (EST)

or

Information Session #2: Monday, August 1, 10-11am (EST)

**Our draft agenda includes:**

- a. **Update on EPA Region 4 EJ developments** (i.e., program, EJ Academy, hiring and more). Note that we'll speak about similar developments other regional programs are embarking upon.
- b. **Upcoming National EJ-related fundings in the coming months.** *We plan to cover not only our traditional EJ grants, but also two new RFA – “Request for Application” Fundings that are anticipated to be announced early August and September (see more information below).* We wanted to extend this information to you personally so that you can consider, or help us identify potential applicants to support our Southeast communities and advance EJ & civil rights. We will answer your questions accordingly and hope you'll spread the good news with your partners.

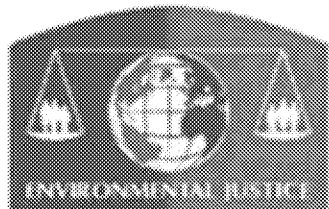
**Supplemental Information**

- **“New” Funding: “TECHNICAL ASSISTANCE RFA to be Announced.”** Highlights, as of this time:
  - **TC-TAC – Thriving Communities Technical Assistance Centers program** (previously called REACH – Regional Equity & Capacity Hubs)
    - Concept: A “one-stop shop” Technical Assistance (TA) program with a special emphasis on underserved communities where multiple centers across the USA provide support on a wide range of topics (i.e., Technical Assistance, Training, and Support/Resource Activities).
    - Funding: It is projected that a total of \$50 million in funding will be awarded under this RFA. EPA anticipates making between 5 - 10 incrementally funded awards with periods of performance of three years with total funding of approximately \$6 million per award depending on an array of factors (\$2M budgeted per year).
    - Eligible: *public/private universities, public/private nonprofit orgs/institutions, Intertribal Consortia.* More specifics to come in the RFA.
    - RFA – Request for Applications, anticipated early August 2022.
    - Outreach: EPA HQs will be doing outreach webinars to help explain this opportunity
- **“New” Funding: “FUND-THE-FUNDER” RFA to be Announced.”** Highlights, as of this time:
  - **Pilot Sub-Award Approach for Small Grants: “FUND-THE-FUNDER”**
    - Concept: The Agency is Piloting a “Fund-the-Funder” approach and will provide all funds for EJ Small Grants to 1 - 2 entities to manage the program. The organization will manage the competition process and subaward funds to communities.
    - Eligible: Nonprofits (large), Colleges/universities, & Intertribal Consortia
    - Awardee(s): *1-2 entities, will received estimated \$10M*
    - RFA – Request for Applications, anticipated September 2022.
    - Outreach: EPA HQs will be doing outreach webinars to help explain this opportunity

In closing, it's estimated that for our Southeast Region 4, we have an average of 38% of our U.S. Census tracts being disadvantaged (per the CEST – beta version on-line tool; ranging from 34% to 58% within our 8 states\*) – so we thank you for your service to many of these under-served and vulnerable Southeast communities with EJ concerns.

**We appreciate your consideration to attend a session and get our latest EJ news. We hope to see you @ any session.** If you have a conflict, please feel free to contact our Regional EJ Coordinator, Tami Thomas-Burton (404-562-8027, [thomas-burton.tami@epa.gov](mailto:thomas-burton.tami@epa.gov)) or myself at any time. We'd be happy to share the materials we will have covered for those sessions, or speak with you. Greatly appreciated,

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**Environmental Justice Hotline:** To report incidents of environmental injustice. Phone: 800-962-6215 - Toll Free;

E-mail: [ejhotline@epa.gov](mailto:ejhotline@epa.gov); Hours: 9:00 a.m. - 5:00 p.m. ET

**Reporting Spills and Environmental Violations Hotline:** Emergency events and spills or releases should be reported through the National Response Center. Also, one can report possible violations of environmental laws and regulations. Phone: 1-800-424-8802; Webpage: <https://echo.epa.gov/report-environmental-violations>; Hours: 24 hours a day

**For up-to-date information:** Subscribe to EPA's Environmental Justice listserv by sending a blank email to: [join-epa-ej@lists.epa.gov](mailto:join-epa-ej@lists.epa.gov). Follow us on Twitter: [@EPAEnvJustice](https://twitter.com/EPAEnvJustice).

\*= MS, AL, GA, FL, SC, NC, TN, KY

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FW: Upcoming NPDES PFAS guidance  
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Reading file

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**Subject:** Upcoming NPDES PFAS guidance

Dear Administrator Regan:

It was great to see you recently at the River of the Year event in Goldsboro. As I mentioned there, we appreciate your leadership on improving PFAS protections. EPA is making so many important strides under the PFAS Roadmap. We believe that EPA's upcoming guidance on NPDES permitting provides a critical opportunity to improve protections for communities in the near term. We recently observed the potential of the NDPEs program when NCDEQ issued the last major permit to Chemours under the consent order. It is the most protective permit I have seen in the nation—essentially eliminating PFAS discharges—and is a model for what states across the country could do to stop PFAS pollution.

I have attached a letter on behalf of more than 70 community groups that are concerned about PFAS pollution. We urge EPA to issue guidance that directs states to use the full authority of the Clean Water Act to protect our communities, with particular focus on the use of technology to prevent PFAS discharges.

Best regards,

Geoff

**Geoffrey R. Gisler**

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November 4, 2022

***Via Electronic Mail***

Administrator Michael S. Regan  
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Dear Administrator Regan:

We write as representatives of communities plagued by PFAS pollution, communities concerned about future pollution, and those who have yet to discover contamination.<sup>1</sup> Too little has been done to protect our communities for too long. This winter, your agency can change that. Although we appreciate the actions EPA has taken, they have not yet reduced PFAS exposure on the ground. The EPA's upcoming permitting guidance for state agencies implementing the National Pollutant Discharge Elimination System (NPDES) stands alone among the actions listed in the agency's PFAS Strategic Roadmap as having the potential to result in near-term reductions in PFAS discharges.

Your experience in North Carolina is an example of the widespread challenges we face and the promise of the Clean Water Act. Communities in southeastern North Carolina were exposed to toxic levels of PFAS for decades. As recently as 2017, the Cape Fear River had PFAS concentrations near 1,000,000 parts per trillion. Now, thanks to your enforcement of the Clean Water Act, levels in the river have drastically declined—yet more must be done to protect communities downstream.

Your action in North Carolina made a significant difference to reduce exposure from a facility known to manufacture PFAS. But across the country, there are hundreds of facilities known or expected to manufacture or use PFAS and discharge them directly into our waters, and many publicly owned treatment works (POTWs) accept wastewater from industrial users who have PFAS in their wastewater. These facilities have mostly operated under the radar, with most states operating under a policy of: “if we don't ask if you have it, we don't have to control it,” when it comes to PFAS. This leaves communities with huge gaps in understanding of where their PFAS exposures are coming from.

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<sup>1</sup> The Southern Environmental Law Center submits this letter on behalf of the listed organizations. Please contact Geoff Gisler at [ggisler@selcnc.org](mailto:ggisler@selcnc.org) or 919-967-1450 with any questions or subsequent correspondence.

As demonstrated in North Carolina, the Clean Water Act and EPA's existing regulations already provide the tools needed to stop the flow of PFAS pollution into our nation's waters and ensure that polluters—regardless of whether they manufacture PFAS—bear the costs of preventing and controlling PFAS contamination. A permit recently issued to Chemours demonstrates the power of the Clean Water Act.<sup>2</sup> Using the EPA's NPDES Permit Writers' Manual, the N.C. Department of Environmental Quality set technology-based effluent limits of 10 ppt for GenX, 10 ppt for PMPA, and 20 ppt for PFMOAA as indicator compounds. With these limits, Chemours will be required to reduce PFAS discharges to near or below the level of detection. Every community affected by PFAS contamination deserves this level of protection.

In April, EPA issued guidance for federal NPDES permits under the Clean Water Act that recognizes the need to identify and control sources of PFAS pollution, including industrial sources that discharge directly to waters and those that send waste through POTWs.<sup>3</sup> Yet if EPA adopts this guidance nationwide, its reliance on best management practices over proven control technology, in particular, will slow cleanup of PFAS in our communities and deter state agencies from issuing protective permits like the one recently issued to Chemours.

EPA's April memo was inconsistent with federal law in three critical ways that, if adopted by the forthcoming guidance, will protect polluters and interfere with ongoing efforts by communities to protect themselves. We request three changes:

- EPA must clarify that known or suspected sources have an ongoing obligation to disclose PFAS pollution as part of their existing NPDES permit and cannot delay disclosure until the next permit cycle.
- The guidance must set forth clear requirements to incorporate technology-based effluent limits (TBELs) on a case-by-case basis in NPDES permits for PFAS dischargers. Existing law and regulations explicitly state that TBELs are the minimum level of pollution control required, but they have not been consistently implemented for PFAS.<sup>4</sup> Best management practices cannot substitute for TBELs.
- EPA must clarify that POTWs are required to evaluate the introduction of PFAS into their systems and use existing authority to ensure industrial users

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<sup>2</sup> N.C. DEQ, Chemours Fayetteville Works Facility, NPDES permit, NPDES NO. NC0090042, <https://perma.cc/84X4-XCDA>; see also N.C. DEQ, Chemours Fayetteville Works Facility, fact sheet, NPDES NO. NC0090042, <https://perma.cc/MP4W-9WCH>.

<sup>3</sup> Fox, Radhika. *Addressing PFAS Discharges in EPA-Issued NPDES Permits and Expectations Where EPA Is the Pretreatment Control Authority*. Environmental Protection Agency, Office of Water, 28 Apr. 2022, <https://perma.cc/4JPU-AJT8>.

<sup>4</sup> 40 C.F.R. §125.3.

pretreat PFAS waste consistent with the prohibition on pass-through or interference.

Enforcement and prompt implementation is also critical. For example, EPA manages the pretreatment program in New York, yet EPA Region 2 has not implemented the April guidance in any New York POTW permit.

PFAS pollution is a serious threat to our communities. The NPDES permitting guidance is the only action in the PFAS Strategic Roadmap that has the potential to reduce PFAS discharges in the near term under existing regulatory authority. Although valuable, EPA's research efforts and National Testing Strategy will not reduce PFAS pollution in the immediate future. Effluent limitation guidelines will take many years to promulgate and will only cover certain industries. Classifying PFOA and PFOS as hazardous wastes will aid in cleanup for those two chemicals but much more needs to be done to stop the worsening crisis.

By March 2023, less than six years after the public learned of Chemours' pollution, every major PFAS pollution pathway at the company's site will be controlled through the appropriate permits. The N.C. Department of Environmental Quality and community groups used the authority in the Clean Water Act to make rapid progress cleaning up the worst environmental disaster in North Carolina history. But that approach is not being used consistently at other PFAS pollution sources in North Carolina or other states. Communities across the country deserve the protection of the Clean Water Act. We urge EPA to use its existing authority to ensure that protection by releasing guidance that clarifies states' full responsibility under the Clean Water Act to stop PFAS pollution at the source.

Sincerely,

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